Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-98-3

FACTS:

You are an attorney in private practice. Until November 13, 1997, you were a City Councilor.

On November 11, 1997, you were approached by a business association that requested your services as an attorney to represent the association before the Board of Health in relation to a solid waste transfer station and recycling facility (jointly designated "Facility") site proceeding before the Board of Health ("Board").[1/] The association is comprised of businesses who are abutters to the proposed Facility. After consulting with the Legal Division of the Ethics Commission you learned that you could not represent this association before a City board while you remained a City Councilor. Following this telephone conversation, you resigned from the City Council. You question whether, as a former municipal employee, you may represent the association if the Facility applicant appeals the Board siting decision to the Superior Court.

Solid Waste Facility Site Process

Under G.L. c. 111, §150A, a solid waste transfer facility may not be built in a municipality unless the local board of health has held a public hearing and assigned a site in accordance with the provisions of the statute. The determination by the local board of health to assign a site for a facility must be based upon site suitability criteria established by the state Department of Environmental Protection ("DEP") in cooperation with the state Department of Public Health ("DPH").

Any applicant wishing to establish a new facility on a site not previously assigned must file a site assignment application simultaneously with the local board of health, DEP and DPH. 310 CMR §16.08(1). Upon receipt of the application, DEP accepts comments for 21 days prior to making a determination that the application is complete. After notice of completeness, the applicant is required to notify abutters to the site, including any abutting towns' boards of health. Following notice to abutters, within 60 days, DEP conducts a review of the application to determine "whether the proposed site meets the criteria[2/] established under [the statute] for the protection of the public health and safety and the environment." G.L. c. 111, §150A; 310 CMR §16.10. Also within 60 days, DPH reviews the application and comments upon "any potent-ial impact of a site on the public health and safety." G.L. c. 150, §150A.

Following its review and determination, DEP sends its decision and the DEP record to the local board of health. Until DEP determines that the proposed site meets the statutory criteria, the board of health may not hold hearings or make a determination concerning the application. *Id.*

Within 30 days of receiving DEP's report, the local board of health conducts a public hearing in which the parties have the right to present evidence, cross-examine witnesses, make objections and oral arguments. 310 CMR §16.20 (10). The hearing officer may permit

intervention in the proceedings, after a determination that the persons seeking to intervene "are specifically and substantively affected." 310 CMR §16.10(9). Any abutter or group of abutters may register as a party. Further, any group of ten or more citizens may register as a party to the public hearing if damage to the environment is or might be at issue, but such intervention by a ten citizen group is limited to the issue of damage to the environment. The board of health also may hire consultants to advise it by, among other things, determining whether the data is complete and accurate, whether correct analytical techniques were used, whether the data supports the conclusions and what other data needs to be obtained. Board of health consultants may examine records, visit the proposed site, review the DEP report, and make comments relating to technical issues concerning site suitability. 310 CMR §16.30(2)(c)(3).

Under G.L. c. 111, §150A, "a local board of health shall assign a place requested by an applicant as a site for a new facility. . . unless it makes a finding, based on the siting criteria established by [the statute] that the siting thereof would constitute a danger to the public health or safety or the environment." Under the statute and 310 CMR §16.20(12), "the board of health may include in any decision to grant a site assignment such limitations with respect to the extent, character and nature of the facility. . . as may be necessary to ensure that the facility. . . will not present a threat to the public health, safety or the environment." The board of health is required to put its decision in writing and to include in the decision a statement of reasons and findings of fact. G.L. c. 111, § 150A; 310 CMR §16.20(10)(k)(4).

Any person aggrieved by the board of health decision may appeal said decision to the superior court under the provisions of G.L. c. 30A, §14.[3/]

Procedural Background of City Solid Waste Transfer Site Proceeding

On April 12, 1996, a Company applied to DEP for a site suitability assessment pursuant to G.L. c. 111, §150A, for a 1000-ton Facility to be located in the City (First Application).[4/] On September 20, 1996, the DEP issued a report denying suitability because "the project proponent had not demonstrated that the local roadways accessing the site could handle the volume of traffic to be generated by the facility." *Decision and Statement of Reasons*, Board of Health, March 4, 1998. Because DEP issued a suitability denial, the Board of Health never reviewed the first application. 310 CMR §16.15(1) (if DEP issues report that site fails to meet criteria, then site assignment process is complete and board of health shall not hold public hearing).

Subsequently, on June 24, 1997, the Company again simultaneously applied for a site assignment with the Board and for a site suitability assessment with DEP for a 600-ton Facility on the same site in the City as the First Application (Second Application). On October 10, 1997, DEP issued a report finding that the site application met the statutory criteria set forth in G.L. c. 111, §150A.

The Board received the DEP decision on October 13, 1997. The Board appointed a hearing officer and retained special counsel to the Board. On November 17, 1997, the hearing officer commenced hearings on the site application. You indicate that 24 groups were allowed to intervene or register as parties in the proceeding. In March 1998, the Board denied the site assignment, finding that the application was materially incomplete and deficient, such that a new application would be required to be filed for DEP's consideration. The Board further found that the proposed operations would be a danger to the public health, safety and the environment. Finally, the Board considered a number of possible conditions to impose on the site, but found that, if the site were approved and all of the conditions implemented, the site would continue to

be a danger to the public health, safety and the environment. The applicant may file an appeal of this Board decision in the Superior Court.

The City Council's Involvement In Solid Waste Transfer Facility Site Process

Under G.L. c. 111, §150A, DEP's regulations, and the governance of the City, the City Council has no official responsibility for any aspect of the Site Assign-ment decision. By G.L. c. 11, §150A, the Board has the sole responsibility, on the local level, for the site assign-ment decision. Approval of the design of the facility is the responsibility of DEP. The City Council did not petition to intervene in the Board proceedings. Further, there are no zoning issues to come before the City Council as the site currently is zoned for heavy industry.

Nevertheless, you state that, as a City Councilor you participated in three votes relating to the siting of a Facility in the City. First, you explain that, on January 16, 1996 you voted to "request the City Manager to organize a task force to study the site assignment process for locating transfer stations." You state that the purpose of this vote was to require the City Manager and his staff to educate themselves regarding the site assignment process in general. A task force was formed. You did not participate in the task force and you do not know if the task force ever met. No task force report was submitted to the City Council. This vote occurred prior to the filing of the First Application with DEP.[5/]

Second, you state that, on October 29, 1996 you voted to "draft and send letters to our local [state house] delegation to express the council's opposition to placing a transfer station on any location within the city limits." At the time of this vote, DEP had denied the First Application. The Board of Health had never reviewed the First Application for a site assignment. No site assignment application was pending at the time of this vote. You characterize this vote as a desire by the City Council to express, to the state delegation, the city's opposition to siting <u>any</u> transfer station <u>anywhere</u> within the City limits. According to you, the City Councilors felt that the City had borne a disproportionate share of the environmental burden in the area. At this meeting, you commented that the transfer station project could still be viable and you predicted that the applicant would return with a smaller facility plan. You urged the Council to review its zoning bylaws and other ordinances.[6/] You state that your comments were based on your speculation that the applicant would try again as the applicant was heavily invested in the project and you wanted the City to be prepared.

Finally, you indicate that, on November 4, 1997, subsequent to the submission of the Second Application, you voted to "transfer $20,000 from the city manager's contingency fund to the Inspectional Services Dept. to fund the possible use of expert witnesses in the board of health hearings for the trash transfer station." It is your understanding that the experts had been retained to assist the Board, as permitted by DEP regulation 310 CMR §16.30(2)(c)(3), but that the City's Chief Financial Officer and the City Manager recommended the motion in order to replenish funds that had been expended out of the Law Department budget for experts. The City Council is required to approve the transfer of all funds over $50 from one line item to another. At this meeting you made a second to the motion to transfer the funds and voted on this transfer. You did not participate in any other substantive discussion concerning the transfer of funds. The City Council was not involved in any recommendation that the Board hire experts to assist it or in approving what experts the Board would hire. This November 4, 1997 vote was the only vote that the City Council took, while you were a member, that related to the second application for site assignment.

QUESTION:

As a former municipal employee, may you, consistent with G.L. c. 268A, §18, represent a business association in a Superior Court appeal of a City Board of Health decision?

ANSWER:

Yes.

DISCUSSION:

Recognizing that there are circumstances where a government employee's loyalty to the government should continue even after he leaves public service, the Legislature, in G.L. c. 268A, placed certain restraints on the activities of government employees after they leave the government. The restrictions on former municipal employees are contained in G.L. c. 268A, § 18. Section 18(a) prohibits a former municipal employee from receiving compensation from or acting as agent or attorney for anyone, other than the City, in connection with a particular matter[7/] in which the City is a party or has a direct and substantial interest and in which he previously participated as a City employee. Section 18(b) prohibits a former municipal employee, within one year of leaving municipal service, from appearing personally[8/] on behalf of anyone, other than the City, before any City agency, in connection with any matter in which the City is a party or has a direct and substantial interest and in which he had official responsibility[9/] in the two years prior to leaving municipal government.[10/]

As the Commission has commented, in discuss-ing G.L. c. 268A, §5, the state counterpart to §18,

> the undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. . . the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182; *see also, EC-COI-92-17*. In the sections of the conflict of interest law concerning former government employees, the Legislature sought to balance its concern that a former government employee remain loyal to the government in matters in which he was most involved with a desire not to entirely prevent a former employee from using expertise gained in government service in his private employment. *EC-COI-92-17*.

Not every action taken by a municipal employee while serving the government will trigger the prohibitions of §18. To implicate §18(a), the municipal employee must have personally and substantially participated in a particular matter while in government service. For purposes of our analysis, we consider the relevant particular matter to be the Board proceeding because that is the proceeding in connection with which you are receiving compensation and acting as an attorney.[11/] You acknowledge that you voted, while a member of the City Council, in three instances where the subject matter concerned a proposed Facility. At issue is whether, by voting as a City Councilor, you personally and substantially participated in the Board proceeding. For the reasons discussed below, we conclude that you did not personally and substantially participate in the Board proceeding.[12/]

"Participation" is defined in G.L. c. 268A, § 1(j) as

> participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

The modifying terms "personally and substantially" are not further defined in the statute. When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES,* 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "personally" from Webster's Third New International Dictionary (unabridged) is "so as to be personal: in a personal manner: as oneself: on or for one's own part." The term "substantial" is defined as "existing as or in substance: material: important, essential." *Accord*, Black's Law Dictionary (6th Ed.).

Additionally, in its precedent, the Commission has relied on the interpretation of the federal Office of Government Ethics in construing the term "personal and substantial", as the Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of interest statute, including the phrase "personal and substantial." *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962, at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in Congress; much of language of proposed conflict law taken and adopted from federal bill); *EC-COI-87-33* (expressly relying on federal regulation). The federal counterpart to §18(a), restricting former federal employees, is 18 USC §207(a),[13/] which also contains the term "participate personally and substantially." By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has further described and clarified the phrase "personal and substantial participation" in a manner consistent with the dictionary definition, stating:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. (emphasis added).

For example, formulation of a particular matter, through discussion, in preparation for a vote, as well as voting on the matter is personal and substantial participation. *Graham v. McGrail*, 370 Mass. 133, 138 (1976); *see, e.g., EC-COI-87-33*. Under our precedent, it is not necessary for one to be the final or ultimate decision-maker to have participated personally and substantially in the decision. If one discusses or makes recommendations on the merits of a matter one will be deemed to have participated personally and substantially in a matter. *See EC-COI-89-2* (discussion of the merits of a particular matter); *EC-COI-79-74* (participation found where employee discussed with decision-makers factors that were central considerations of the final evaluation of a contract even if employee did not participate in selection, final review, approval and execution of contract); *In re Craven*, 1980 SEC 17, *aff'd*, *Craven v. State Ethics Commission,* 390 Mass 101, 202 (1983) (state representative participated by using position to exert pressure on agency to award contract). Moreover, one may participate in a particular matter by supervising or overseeing others. *See EC-COI-93-16; 87-27; 89-7*.

In comparison, if a public employee merely provides information to the decision-makers, without providing any substantive recommendation, or the employee's actions are peripheral to the merits of the decision process, the employee's actions will not be considered to be personal and substantial participation. *See e.g., EC-COI-85-48* (forwarding claim to appropriate staff for review and determination); *82-138; 82-82* (providing peripheral information in the decision-making process). For example, in *EC-COI-81-113,* a state employee, in his state position, provided technical advice to a city, advising the city not to provide certain information in its response to a request for proposals for a grant awarded by the state agency. Subsequently, the state employee left state government and was approached by the city to serve as a consultant to the city under the grant. The Ethics Commission concluded that the advice the employee rendered to the city occurred at a preliminary stage in the process and was peripheral and immaterial to the final grant determination. The Commission contrasted this state employee's involve-ment with that of the state employee in *EC-COI-79-74* cited above, who rendered advice related to the central considerations in the final evaluation of a contract and whose expert opinion was sought by decision-makers. *Id.; EC-COI-79-74*.

Similarly, in *EC-COI-88-11*, a state employee had one telephone conversation with a city official concerning the city's interest in developing a parcel of property. The state employee advised the city official that the city needed a plan to develop the property. This action by the state employee was not deemed to be personal and substantial participation such that the state employee, having left state service, was precluded from consulting for the city on issues relating to the city's creation of a master development plan for the property. *See also, EC-COI-81-159* (initial suggestions regarding division's operational needs not related to ultimate decision to contract).

In each of the opinions discussed above, the Commission reviewed the public employee's actions while in the government and weighed whether the actions were material and of substance to the particular matter at issue so that the employee's sole loyalty in the matter should remain with the government. We now turn to a consideration of whether each or any of your City Council votes constituted personal and substantial participation in the Board proceeding at issue.

Relying on the plain meaning of the words "personal and substantial", the federal interpretation of the phrase and our precedent, we conclude that your January 16, 1996 vote to request the City Manager to organize a task force to study and educate the City Manager's office about the siting process did not constitute participation, within the G.L. c. 268A, § 1(j) definition, in the Board proceeding. At the time of this vote, no application was pending before the Board. The purpose of the task force was to encourage City officials to educate themselves about the siting process in general. We characterize this vote as preliminary and peripheral to any actual proceeding.

Additionally, based on your understanding and characterization of the November 4, 1997 vote, we consider that vote to transfer funds from the City Manager's line item to the Inspectional Services Department line item to be an administrative matter that was peripheral to the Board proceeding. It is your understanding that the Board had retained experts to help the Board better understand the data and that some funding had been paid from the Legal Department budget. The transfer was to replenish the Legal Department's budget. The City Council offered no advice, recommendation, or took other substantive action regarding the merits, such as, whether the Board should retain experts, the nature of the experts to be

retained, the identity of the experts, or how the experts should be utilized in the Board proceedings.

We consider the October 29, 1996 vote to write the statehouse delegation a "closer call," but conclude that, by this vote, you, as a City Councilor, did not personally and substantially participate in the Board proceeding, as required by G.L. c. 268A, § 1(j). When the City Council voted to notify the local state house delegation that the Council was opposed to the siting of any facility anywhere in the City, it was making a general policy statement,[14/] unrelated to the merits of a specific application. At the time of the vote no application was pending, although you, at least, suspected that the applic-ant would submit another application. The City Council did not send its statement to the Board or to DEP, thus attempting to influence those officials who were the decision-makers. *See e.g., In re Craven,* 1980 SEC 22; *EC-COI-81-113*. Moreover, the City Council had no authority to intervene in any specific siting proceeding.

In conclusion, your participation in these specific City Council votes was not sufficiently personal and substantial participation in the siting decision such that you should be barred from acting as an attorney in a potential appeal of the siting decision. As the Commission has indicated, the purpose of the restrictions on former public employees "is to bar . . . former employees, not from benefitting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer." *EC-COI-93-16* (quoting *EC-COI-92-17*). You did not have access to any confidential information from the Board proceedings or any "inside" familiarity with the proceedings. Your City Council votes of January 16, 1996, October 29, 1996 and November 4, 1997 were not material to the Board proceeding and do not constitute personal and substantial participation in that proceeding so as to preclude your representation of private parties in connection with that proceeding.

DATE AUTHORIZED: May 12, 1998

1/Members of the Board are appointed by the City Manager with confirmation by the City Council.

2/The criteria to be used by DEP and the local board of health in reviewing a site assignment application are contained in G.L. c. 111, §150A½. Among the considerations are the impact on municipal water supplies; proximity of water sources and wetlands; proximity to residential areas; air quality; potential for creation of a nuisance from noise, litter, rodents, or flies; potential for adverse public health consequences; traffic impact.

3/According to G.L. c. 111, §150A, "for the limited purposes of such an appeal, a local board of health shall be deemed to be a state agency under the provisions of said chapter thirty A and its proceedings and decision shall be deemed to be a final decision in an adjudicatory proceeding."

4/On June 11, 1996, MVP also applied to the Zoning Board of Appeals for a special permit for the site. The Zoning Board of Appeals denied the permit because of a lack of jurisdiction.

5/You have been informed that, on August 13, 1996, the City Manager sent a letter to DEP expressing his concerns about the first application and its potential effect on the City. The City Manager initiated this contact with DEP and had not been directed to do so by the City Council.

6/In preparing this opinion, the Ethics Commission staff reviewed two videotapes of the October 29, 1996 City Council meeting and the November 4, 1997 meeting.

7/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

8/The State Ethics Commission has concluded that "appears personally" includes contacting one's former agency in person, in writing or orally, regarding a substantive matter. *EC-COI-87-27*.

9/"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

10/This opinion does not address the prohibitions of G.L. c. 268A, §18(b). We conclude that G.L. c. 268A, §18(b) is not applicable to the situation you present because, under G.L. c. 111, §150A, the City Council did not have any official responsibility for the siting decision. The City Council had no authority "to approve, disapprove or otherwise direct" any Board action in the siting decision.

11/We acknowledge that you have asked whether you may represent the association in the Superior Court, not before the Board. However, your proposed Court representation would be "in connection with" the Board proceeding for purposes of §18(a) because the two proceedings are integrally related. *See e.g., EC-COI-92-17.*

12/By this conclusion, we do not in any way imply that you did not personally and substantially participate in the City Council proceedings. Your votes as a City Councilor constituted personal and substantial participation in those particular matters.

13/18 USC §207(a)(1) places a permanent restriction on former federal employees who make, with intent to influence, any communications or appearance before any department, agency, or court of the United States in connection with a particular matter in which the United States is a party or has a direct and substantial interest; in which the federal employee had participated personally and substantially; and which involved a specific party or specific parties at the time of the participation.

14/In considering whether the adoption of an agency budget is a particular matter, the Supreme Judicial Court observed, "the definition seems to refer primarily to judicial or quasi-judicial proceedings rather than to legislative or managerial action. . . the Legislature has clearly indicated its intention to exclude from the statute some determinations of general policy, and such an exclusion seems to be essential if the statute is to be workable." *Graham,* 370 Mass. at 139; *see also, Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 34 (1984). We think that the Supreme Judicial Court's observation in *Graham* is particularly apt to describe the action of the City Council on October 29, 1996.